

INTERAGENCY ADVISORY GROUP

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Secretariat
Room 1304—1900 E St., N.W.
Code 101, Ext. 26266 or
Area Code 202—632-6266

Handwritten: L. PC

Minutes of the IAG Committee on Employee Relations

July 20, 1979

Isn't this contradictory?

The meeting was chaired by Wilma Lehman, assisted by Deborah House and Cameron Smith of the Merit Systems Protection Board, and Jennifer Johnson of the Equal Employment Opportunity Commission.

Mrs. Lehman first introduced Ms. House and Mr. Smith, saying that they were available to answer questions on the permanent MSPB regulations, published June 29, 1979, in the Federal Register. She expressed the sentiments of the Committee on the increased readability of the permanent regulations and the fact that MSPB had responded to many earlier concerns of Committee members. Following are some of the questions and points brought up by the members on MSPB requirements.

Requirement that each person affected by an action be given a copy of MSPB regulations

Several members stated their view that only employees who actually request a copy of the regulations or who wish to appeal need be given copies, and that, otherwise, having them in the agency available for review would be sufficient. Giving them to every employee affected by an action appears to these members to be onerous and costly. Another member disagreed, pointing out that his agency has always given copies of agency and Commission or Office regulations to each individual against whom action is taken. This member believes it more efficient for the employee to have a copy, and the cost of printing is not great. Finally, a member asked if MSPB could issue a condensed booklet of MSPB regulations similar to that containing provisions of Title 7. Ms. House said it was under consideration, but that budget constraints prohibited it now.

Agency problems with getting permanent MSPB regulations to distant field offices

One member pointed out to the MSPB representatives that his agency had been unable to get the new regulations to all agency field offices

before the effective date of June 30, 1979. If the agency were not immediately in compliance with the new regulations, would there be any difficulties? Ms. House said that the MSPB field office had been instructed to treat these situations liberally. If a decision has already been given an employee under the interim regulations, and the agency is in compliance with the interim regulations, there will be no error.

Appeals of terminated probationers

A member asked if terminated probationers have the right to a hearing? If so, do all the requirements of section 1206.56 of the MSPB regulations apply, with regard to preponderance of the evidence, etc.? Mr. Smith said that there would be the right to a hearing, but that only the procedures followed and certain types of discrimination could be appealed. The member asked why terminated probationers were allowed to appeal at all, since the Act did not grant that right. Mr. Smith noted that Part 315H gives the right of appeal to a probationer.

Requests for the presiding officers to travel to agency sites for hearings

A member said that it was his understanding that a Comptroller General decision is pending as to whether agencies can reimburse MSPB for the travel expenses of presiding officers who go to agency sites. How will this be handled -- will MSPB notify the agency if an appellant requests a hearing? Mr. Smith said that MSPB will only act on agency requests for a change of location. A member said his agency has always requested a change of location in each instance. While these requests were turned down initially, they are accepted now if they are accompanied by an offer of reimbursement and if the changed location is agreeable to the appellant and his or her representative. The other reason for a change in location would be a hardship request by the appellant, so that the appellant could have due process.

Requested guidance on attorneys' fees

A member asked if MSPB would be providing guidance on the payment of attorneys' fees, or whether the matter will be determined by case law. Ms. House said that there is a case now in court on this matter. Since the criteria set by the statute and legislative history are not precise, the Board cannot be too specific.

A member noted that the MSPB regulations provide that the presiding officer can recommend the payment of attorneys' fees. If an action is resolved at the agency level, can the agency grant such fees? Ms. House said that only the Board had the statutory right to grant fees in the course of an appeal and that the granting of

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these fees would be subject to some limitations, according to the legislative history. Jennifer Johnson of EEOC pointed out that EEOC draft regulations provided for payment of attorneys' fees in connection with EEO complaints before the agency.

Possible ways of publishing MSPB decisions

Mr. Smith said no final decision had been made whether to publish all decisions, selected ones, or a digest of decisions. Currently, all the decisions are available on microfiche. Which system would members find most useful? Members' opinions ranged from having all decisions published with a good index to having a digest of significant decisions. Mr. Smith said there was a possibility of commercial publishers handling this, though they might not find the relatively small audience for these decisions to be profitable.

Processing of mixed cases

One member brought up the situation where an employee had filed a discrimination complaint concerning an early stage of an adverse action within the agency. The employee then filed an appeal on the final action by the agency without raising any issues of discrimination. The overlapping processes will result in two separate and possibly conflicting decisions on the same action. He feels the area needs clarifying in EEOC and MSPB regulations.

Jennifer Johnson of EEOC's Office of the General Counsel said that her office is developing regulatory language on mixed cases and will be working with MSPB. She hopes that such questions can be clarified by EEOC regulations. She noted that the draft regulations will cross-reference MSPB regulations to require that the employee be told of EEO complaint rights and of his or her right to elect which process to follow. (Note: complementary regulations of MSPB and EEOC for the processing of "old" mixed cases (pre-Civil Service Reform Act) are to appear shortly in the Federal Register. The projected publication date is Friday, August 10, 1979.) Ms. Johnson asked members to suggest hypothetical problems or situations for EEOC to consider to Constance Dupre at EEOC, with a copy to MSPB.

Mr. Smith noted that these situations are not new, and that even while CSC provided for election, there was always the case where an employee would not make an election. He believes judgments will have to be made on a case-by-case basis on whether an issue of discrimination is related to an appealable action.

Possible expansion of MSPB informational bulletins

A member asked if MSPB could get the answers to questions like these out in its bulletins. Mr. Smith said that the plan for the future included bulletins issued on a biweekly basis.

MSPB stays of certain performance-based actions

In response to a member's question, Paul Trause of OPM's Office of the General Counsel noted that MSPB had issued an order on July 18, 1979 extending a stay of certain actions by one agency taken under Part 432 from 15 days under section 1208(a) to an additional 30 days under section 1208(b).

Note: Since there was not time to present the scheduled run-down on MSPB decisions, we are giving it here for your information. As of July 20, 147 substantive decisions had been received under Part 752, while six had been received under Part 432.

Of the 752 decisions, 87% (128) initially sustained the agencies' actions, 10% (15) were reversed on the merits, and 3% (four) were reversed on procedures. In two of the decisions, procedural errors were found not to be harmful errors. In the cases involved, there were 128 removals, ten suspensions, five reductions in grade and two reductions in pay. Three double actions, i.e., suspensions/removals were appealed. In each of these three cases, the removal actions were sustained while one suspension during the notice period was overturned for procedural reasons. Eleven appeals involved allegations of discrimination, of which none were upheld by the presiding officer. We note that three apparently performance-based actions were adjudicated (and possibly taken) under Part 752. One has been reopened by MSPB on its own motion, remanded to the presiding officer for adjudication under Part 432, and has been decided under that part, with the decision again initially sustaining the agency's action.

Of the six Part 432 decisions received thus far, four have sustained the agency's action, while two agency actions were reversed, one for procedural reasons, the other on the merits. In one case, there was an allegation of racial and age discrimination, which the presiding officer found not supported by any evidence.